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Case Number: DA 19-0267

IN THE MONTANA SUPREME COURT

No. DA 19-0267

STATE OF MONTANA,
Plaintiff and Appellee,
vs.

WALLIS DEAN SINZ,
Defendant and Appellant.

APPELLANT'S REPLY BRIEF

On Appeal from the Montana First Judicial District Court,
Lewis & Clark County, Honorable Kathy Seeley, Presiding

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ARGUMENT

I. INTRODUCTION

Because the parties' primary briefs are organized differently, there exists a potential for confusion which should be addressed at the outset. The first issue argued in appellant's brief is the trial court's apparent error in responding to the deliberating jury's second inquiry without consulting with the parties, and in the absence of the defendant. In the State's Response Brief [hereafter, S.Bf], this jury- inquiry issue is treated third (S.Bf, 34-42). Similarly, the second issue in appellant's brief is the first issue discussed in the State's brief; and the third issue in appellant's brief is the second issue discussed in the State's brief.

Why the State structured its response argument in this manner is unknown, but it is crucial that there be no confusion about which issue is which, because wholly different standards of review are applicable to issues #1 and #3 respectively. Appellant recognizes, of course, that issue #3 (involving expert testimony on the characteristics of child sex abuse "disclosures") has to be reviewed under the plain error doctrine, since the testimony was not objected to at trial. However, the State in its Response Brief is arguing that issue #1 (the jury- inquiry question) must

also be decided under plain error, a contention with which appellant strongly disagrees [see below]. This is obviously important, because the burden on the parties is quite different under regular plenary review of trial error, on the one hand, and plain error review, on the other.

II. THE TRIAL COURT COMMITTED REVERSIBLE STATUTORY AND CONSTITUTIONAL ERROR WHEN IT ANSWERED A CRITICAL JURY INQUIRY CONCERNING ORDER OF DELIBERATION WITHOUT CONSULTING WITH COUNSEL AND IN THE ABSENCE OF DEFENDANT.

1. The applicable standard of review on this issue is *not* "plain error," as the State contends, but regular plenary review of statutory and constitutional trial error.

More than four hours into its deliberation, the jury sent a note to the judge inquiring what to do if it could not reach unanimous agreement on the primary charges in counts #1-3 of the Information. Instead of calling the parties into chambers to consult about this note, the court simply "took it upon itself" to answer the inquiry, Tr. 616. Subsequently, the jury returned verdicts of guilty on all five counts of the Information. After receiving the verdict, polling the jury, thanking it for its service, and discharging it, the court informed the parties that it had received and answered a second jury note. Understandably, no objection was lodged at this point; it would have been futile, since there was no way

then for the judge to consult with the parties, formulate a proper response to the note, and present it to the jury–a verdict had already been rendered, the jury was gone, and the trial was over. Yet the State contends that the absence of such an objection makes this error unreviewable, or, at best, reviewable under the plain error doctrine (S.Bf, 35-38).

Montana precedent regarding this situation is quite clear:

> "We generally decline to address an issue raised for the first time on appeal where the litigant had an opportunity to object at trial; however, there is a limited exception which permits the Court to reach the merits of an issue, in the absence of a timely objection, when the party did not have an adequate opportunity to object at the trial level."
>
> –*In re K.H.,* 1999 MT 128,¶14, 294 Mont 466, 981 P2d 1190; *accord, Cenex v. Board,* 283 Mont 330, 941 P2d 964, 968 (1997)

Even clearer is the holding in *State v. Randall,* 137 Mont 534, 353 P2d 1054, 1058 (1960), a case exactly on point, as it concerned a judge's answering a deliberating jury's inquiry without consulting with counsel:

> "But the State contends that no objection was made to the giving of the instruction, and hence that we cannot review the question. The answer to this contention is that defendant had no opportunity to object to the giving of the instruction before it was given... defendant did not know of the harmful portion of the instruction until after it was given, and of course it was then too late to make an objection. The harm had already been done."

Here, too, the harm had already been done–the jury had concluded

its deliberation–and the error was incurable, or, as stated in *State v. Tapson,* 2001 MT 292, ¶35, 307 Mont 428, 41 P3d 305, "...it was not preserved by reason of the commission of the error itself."

Therefore, regular plenary review on this issue is appropriate.

2. The statute requiring the court to consult with the parties before answering an inquiry from a deliberating jury means what it says, and is mandatory, not discretionary, as the State contends.

The State appears to contend that Section 46-16-503(2) MCA, which requires the trial court to consult with the parties before responding to an inquiry from a deliberating jury, is discretionary, not mandatory (S.Bf, 38). However, the phrase "in the discretion of the court" obviously refers to the giving (or not giving) of the information requested by the jury, not to the requirement of consultation with the parties. This is made evident in the Commission Comment on this statute, which says:

> "Subsection (2) has been rewritten for clarity and to reflect established procedure. The court has discretion to offer such information *after consultation with the parties"*
> –10 MCA Annotations, 814 (2018) [emphasis supplied]

Should any doubt about this remain, it may be dispelled by reviewing the parent statute of 46-16-503(2) MCA, Section 95-1913(d) RCM 1947, which provides in relevant part:

"....Upon [the jury] being brought into court, the information requested may be given in the discretion of the court; if such information is given, it must be given in the presence of the county attorney and the defendant and his counsel."

3. This court's prior cases have uniformly held that it is reversible error for a trial court to violate this statute by responding to a jury inquiry without consulting with counsel.

Not only does this statute mean what it says–a trial court is required to consult with counsel before answering a jury inquiry–but also this Court has uniformly held that it is reversible error to violate this statute by *not* consulting with counsel. The first in this line of cases is *State v. Jackson,* 88 Mont420, 293 P. 309, 312-313 (1930), followed by *State v. Herron,* 169 Mont 193, 545 P2d 678, 681 (1976) and *State v. Bretz,* 180 Mont 307, 590 P2d 614, 616-617 (1979). All of these cases reverse, where the trial court responded to a deliberating jury's inquiry without consulting with counsel. In *Herron, ibid,* this Court states:

> "As a general rule, additional instructions to the jury must comply with the law and failure to follow the law constitutes reversible error. The vice of the situation here is that defendant's attorney was not notified nor present and had no way to protect his client from the jury's confusion...
>
> –*Herron,* 545 Pd at 681, quoted with approval in *State v. Steele,* 2004 MT 275, ¶22, 323 Mont 204, 99 P3d 210.

Here, too, defense counsel had no way to protect her client from the

jury's confusion over the order of deliberation, but–even more important –no opportunity to persuade the court to clear up the confusion by providing an instruction that would "maximize the jury's ability to consider the lesser included offenses...such failure was prejudicial..." *State v. Rogers,* 2001 MT 165,¶16, 306 Mont 130, 32 P3d 724.

4. Clearly, a jury inquiry concerning how to handle deliberating on lesser-included offenses when the jury cannot agree on a verdict on the primary charges is a "critical stage of the proceedings," and defendant's presence at the time the court considers such an inquiry is required by the federal and Montana constitutions.

It is well established in Montana that jury deliberations, including inquiries from the jury directed to the court, constitute a "critical stage of the proceedings," and that therefore a defendant enjoys a fundamental constitutional right to be present at such a time, *Tapson, supra,* at ¶16; 19-21. Perhaps the last word on this is found in *State v. Northcutt,* 2015 MT 267, ¶16, 381 Mont 81, 358 P3d 179, which simply points out that "while jurors deliberate in the jury room, the whole case rests in the balance." Even in *State v. Godfrey,* 2009 MT 60, 349 Mont 335, 203 P3d 834, the case on which the State chiefly relies in its harmless error argument on this issue, it is assumed that jury inquiries at this " sensitive stage of the proceedings" (*Northcutt, ibid.)* require the

defendant's presence, unless waived, *Godfrey,* at ¶25-26. Here, the State entertains the same assumption (S.Bf, 37). So there seems little doubt that Mr. Sinz's constitutional right to be present was violated when the trial judge answered the jury's second inquiry without his presence–and possible participation, *see, Northcutt, ibid.*

In this connection, however, it is important to recognize just *how critical* a stage in the proceedings this was in Mr. Sinz' trial. The jury inquiry states:

> "What happens if we cannot come to a unanimous decision for counts 1, 2, and 3? Do we still move on to the lesser charge? Or do we continue to deliberate until we are unanimous?" -- Doc.74.

What was at stake for Mr. Sinz at this moment is revealed in the table below, which compares the differential liability between the primary charge and the lesser-included charge under the statutes in effect at the time of trial, Sections 45-5-503(4) MCA and 45-5-502(3) MCA (2017):

	45-5-503(4)	45-5-502(3)
Mandatory sentence	100 yrs	None
Mandatory minimum	10 yrs	4 yrs (with a good cause exception for less)
Parole eligibility restriction	10 yrs	None
Eligibility for community treatment per Section 46-18-222(6) MCA	No (explicit)	Yes (explicit)

All of this liability, of course, would need to be multiplied by 3, since there were 3 counts of sexual intercourse without consent. In other words, depending on what the jury determined as to lesser-included offenses, the contrast in outcomes was stark: the rest of Mr. Sinz' life in prison, versus possible release to community treatment after a short period of imprisonment, or none.[1]

It is also important to recognize how critical the court's answer to the second jury inquiry really was. The hasty and impulsive answer the court gave amounted to a repudiation of the court's own "failure-to-agree" instruction (Instruction #31, Doc. 71) and was virtually an "acquittal-first" instruction, which, as is well-established, creates

> "the danger that the jury, convinced that the defendant committed some offense, but unsure of whether the defendant committed the charged offense, may convict [on the primary offense] rather than let the defendant's actions go unpunished simply because acquittal is the only alternative to conviction provided for in the instructions"
> –*State v. Robbins*, 1998 MT 297 ¶35 fn 2, 292 Mont 23, 971 P2d 359.

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[1]The State in its Brief, without explanation, characterizes this analysis of the difference in possible penalties between sexual intercourse without consent and sexual assault as 'improper" (S.Bf, 40). This difference is, of course, the very essence of the prejudice Mr. Sinz suffered when the jury was not properly instructed as to their order of deliberation in a "failure-to-agree" situation such as apparently obtained. Perhaps appellate counsel is confused because of our state's doctrine that *juries* do not have the privilege of understanding liability differentials while considering a defendant's guilt or innocence.

In diluting the strength of the "failure-to-agree" instruction rather than reinforcing it, the trial judge, in her response to the jury note, could–and did–undermine the order-of-deliberation policy so clearly articulated in Section 46-16-607, and its companion statute, Section 46-16-606 MCA.

In summary: the second jury note ushered in a very critical stage of the proceedings, and it was constitutional error to exclude the defendant from those proceedings.

5. *State v. G*odfrey, the case on which the State primarily relies in arguing harmless error, is readily distinguishable on its facts from the situation at issue here.

With constitutional and statutory error of this magnitude, the State bears the burden of demonstrating the error was harmless beyond a reasonable doubt, i.e., that there is "no reasonable possibility" that without it the result would have been different; or, in other words, that "it did not have the *potential* to affect the final result," *Northcutt, supra,* at ¶15 [emphasis in original]. The State relies on *State v. Godfrey, supra,* to argue harmless error here, correctly stating that in *Godfrey,* this Court determined it was harmless constitutional error when the defendant was not present during the time the trial court considered and answered eleven jury inquiries sent to it during deliberations, *Godfrey* at

¶37. Why did the Court reach this result? Primarily because *defense counsel was present* at each of the conferences the court held to consider the jury questions, *Godfrey,* at ¶27 and 35; the jury questions were each requests relating to discrete portions of the trial testimony, none of them crucial, ¶27, 35; the court's responses were all formulated *in consultation with counsel* , and were all "routine," ¶35; and "the court did no more than release limited transcript excerpts to the jury, all the while instructing the jury that it must consider the evidence in its entirety," ¶36. In *Godfrey,* in other words: the trial court followed the correct statutory procedure; consulted extensively with defense counsel about the inquiries and the proper response; formulated a correct response, which in every case was agreed to by counsel; and did not affect the course of deliberations in any direct way. This is in marked contrast to the situation here, where: (1) defense counsel was not present when the court responded to the jury inquiry (and where neither counsel nor defendant were even aware there *was* a jury inquiry until a verdict had been announced); (2) the inquiry concerned a single, central matter–how the jury was to structure its deliberations concerning guilt or innocence on primary and lesser-included charges; and (3) the trial court's response

to the inquiry was flawed.[2]

Godfrey, then, is readily distinguishable from the situation at issue here in a number of significant respects, and is a case quite limited in its applicability because of its unusual facts. This was recognized in the *Godfrey* opinion itself, which concludes by saying

> "In another case, and under other circumstances, a potential for prejudice could well be demonstrated in the context of jury deliberations."
>
> –*Godfrey, supra,* at ¶37.

6. The facts here demonstrate a clear potential for prejudice.

Showing an error has a potential for prejudice means showing that if the error hadn't been committed, a different result might have ensued. Here, the facts demonstrate how that different result might have come about:(1) had the court consulted with the parties about the jury inquiry, it might have decided or been persuaded to offer a supplemental instruction in the language of Section 46-16-606 MCA, emphasizing the preference for conviction on lesser-included offenses when there is dis-

[2] It was flawed in at least two ways: (1) it was unresponsive to the dilemma which the jury was seeking guidance about; (2) it deflected attention from the "failure-to-agree" order of deliberation mandated by Section 46-16-607 MCA, rather than emphasizing it, and thus undermined the policy articulated in Section 46-16-606 MCA, favoring conviction on lesser-included offenses where there is reasonable doubt in some jurors' minds as to guilt on the primary offenses.

agreement concerning guilt on the primary offenses; (2) having received this guidance, the jury might have convicted defendant of sexual assault on each of the first three charges.

In order to meet its burden of showing there is no reasonable possibility of prejudice, the State would have to show that the different (and, for the defendant, better) outcome described above is somehow *impossible.* In this regard, the State offers two arguments: (1) it claims the appellant cannot *establish* that, had the court consulted with the parties, it would have sent the jury a response to its inquiry favorable to the defense (S Bf, 40); (2) it points out that the jury returned a verdict rather soon after it received the court's actual response to the note, and concludes that the response didn't affect the jury's deliberations–which it supposes were ongoing while the court considered its note (S.Bf, 39).

As to the first argument: of course the appellant can't establish what the court would have done had it followed the correct procedure, since it didn't follow it. However, since the defense, had it been consulted, had, ready-made, a supplemental instruction already embodied in precise statutory language to propose, and since this language would have directly answered the question the jury was asking in its note, it is

certainly likely(*a fortiori*, possible) that a favorable instruction would have been given.

As to the second argument: it is pure speculation what the rhythm of deliberation of this jury was, and what it might have been had the court consulted with counsel about its inquiry. It is certainly possible that the State is correct in describing what it imagines the jury was doing. It is equally possible that the jury was waiting for an answer to its note before proceeding further (after all, it asked the judge for guidance about the consideration of lesser-included offenses *for a reason*). And it is also reasonably possible that, had the answer it received to its note been formulated to encourage it to deliberate on the lesser-included offenses, it would have done so and convicted the defendant of those[3]. And, of course, it is also reasonably possible that the court's actual response to the jury note essentially acted as a dynamite instruction and caused the early return of a verdict.

These competing scenarios are, it seems, at least equally plausible

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[3]The State apparently believes the jury could not have been struggling with the scant evidence of penetration because it believes such evidence was convincing (S.Bf, 39) However, we know that some jurors, at least, *were* struggling with the weakness of this evidence. How do we know this? The jury said so in its notes to the court: the jury could reach no unanimity on counts 1, 2, and 3, for each of which a finding of penetration was required.

constructions from the known facts; and if this is so, then the possibility of a very different outcome has been established, and this error may not be deemed harmless.

III. DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE WHEN HIS COUNSEL REACTED WITH MUTE PASSIVITY TO A PROSPECTIVE JUROR'S REVELATION OF LIFE EXPERIENCES INDICATIVE OF BIAS, AND THEN PERMITTED THIS JUROR TO SERVE AS FOREPERSON OF THE JURY.

1. Jurisprudential considerations relating to ineffective assistance claims concerning deficient performance during voir dire and jury selection.

Confronted with a vivid instance of professional incompetence occurring during voir dire, appeal counsel faces a jurisprudential dilemma: decline to argue it on direct appeal, thereby perhaps waiving the issue pursuant to Section 46-21-105(2) MCA, or argue it and risk dismissal without prejudice pursuant to the principle that the reasons for failing to question a juror properly during voir dire are not apparent from the record, *State v. Racz,* 2007 MT 244, ¶27-29, 339 Mont 218, 168 P3d 685.

But there is a further dilemma, created by a conflicting line of cases concerning how to evaluate what seems a flagrant breach of professional standards in regard to voir dire and jury selection. According to *State v.*

Stratton, 2017 MT 112, ¶10, 387 Mont 384, 394 P3d 192, the matter may not be considered on direct appeal if there is any *conceivable* justification for counsel's inaction; whereas according to *State v. Weber,* 2016 MT 138, ¶22, 383 Mont 506, 373 P3d 26, if there is no *plausible* justification for counsel's omissions, "the record does not need to disclose counsel's reasons for the omission," and the matter may be reviewed on direct appeal.

On the record here, defendant concedes he cannot meet the *Stratton* standard, but does believe he can meet the *Weber* standard, as explained below.

2. There exists no plausible justification for defense counsel's inaction concerning the juror in question here.

Prospective juror Dana Curry revealed during in-chambers voir dire that his brother-in-law ("actually, my *ex*-brother in law") was in prison "for a very similar crime [done] to my niece who was 8 years old at the time," Tr. 87. "Plenty of years passed before she accused him, and she did it because of her little sister..." Tr. 87. Struck by the uncanny similarity of this confirmed crime to the crime alleged against Mr. Sinz, both the judge and prosecutor asked Mr. Curry if he thought he could be fair to

Mr. Sinz, in spite of having such a close (and presumably intense) life experience with the very type of situation at issue in Mr. Sinz' trial. Mr. Curry's two responses were:

> "...it's hard to say what it will be like during trial, but right now, I don't think it will be an issue, but–" (Tr. 88)
>
> "The answer to that now, is yes. It's a different situation going through trial and whatnot, so–" (Tr 88)

In each case, he was cut off by his interlocutor before he could explain the qualification to his avowal of an ability to decide the case on the evidence and be fair to Mr. Sinz.

Aside from the many questions that competent defense counsel would normally ask Mr.Curry about the details of his experience with his niece's abuse and how those would affect his ability to be fair to Mr. Sinz, the responses just quoted concerning his ability to be impartial seem to cry out to have the ellipses completed. It was the duty of defense counsel to see that this happened. Instead, counsel said nothing to Mr. Curry–nothing!–and he left chambers. Later, counsel failed to use a peremptory on him, and he ultimately became foreman of Mr. Sinz' trial jury.

There is no plausible justification for this inaction. This was in-chambers voir dire, none of the other jurors were present, and numerous

jurors had already been excused by the court, based on responses about their experiences regarding child sex abuse much less alarming in their indications of bias than Mr. Curry's. He came across as the archetype of a juror who would probably not seriously credit the presumption of innocence or follow the reasonable doubt standard in a case like this– a type of case close to his heart. To indulge in total inaction in this circumstance would seem to mean defense counsel did not know how to conduct voir dire, or simply didn't care who served on the jury.

IV. THE TESTIMONY OF THE STATE'S EXPERT ON CHILD SEXUAL ABUSE CONSTITUTED A DIRECT ATTACK ON THE PRESUMPTION OF INNOCENCE, AND IS REVERSIBLE ERROR UNDER PLAIN ERROR REVIEW.

1. The State in its brief reformulates the appellant's constitutional claim as an evidentiary claim about "improper bolstering," and thus totally fails to address the actual argument advanced by appellant.

In 10 pages of its brief discussing this issue, the State mentions the presumption of innocence three times, but devotes all of its argument to refuting a claim the appellant never makes: that the expert testimony presented by the State in this trial was improper commentary on the credibility of the child witnesses (i.e., "improper bolstering"), and thus invaded the province of the jury (S.Bf, 25-31, 33-35). Typical of the

State's argument in this regard is this passage (S.Bf, 25):

> "This court has repeatedly affirmed the use of an expert to explain the complexities of child sexual abuse and provide guidance to help a jury understand and judge the victim's testimony, and has repeatedly affirmed that such testimony does not infringe upon the jury's duty to decide the credibility of the victim."

In this way, the State attempts to convert defendant's claim of constitutional error into a claim about evidentiary error–with its more lenient standard of review.

2. The expert's testimony cannot be construed as anything but an attack on the presumption of innocence.

In her testimony, Wendy Dutton stated that false allegations of sex abuse by children were "rare." In her closing, the prosecutor argued that her expert had testified that false allegations of sex abuse by children were "very rare." The word "rare" means "uncommon; unusual; seldom encountered," Websters New World Dictionary of the American Language, 1205. "Very rare" would then mean "very uncommon; very unusual; very seldom encountered." If false allegations of sexual abuse made by children are seldom encountered, it follows that those they accuse are seldom innocent. This means that in *any* child sex abuse case, according to the State's expert, the chances are slight that the defendant

would not be guilty. This then means that *in this case,* we know, based on supposedly reliable research, that the defendant is unlikely to be innocent; and we know that from the beginning, because this *is* a child sexual abuse case.

This constitutes a direct (and telling) attack on the presumption of innocence, and was recently recognized as such by this court. In *State v. Grimshaw,* 2020 MT 201, ¶27, 401 Mont 27, ___P3d ___, this court said:

> "...a defendant alleging he is innocent of a sexual crime does not open the door for the State to present statistical evidence that shows a defendant is between 92 and 98% likely to be guilty simply by virtue of being accused. Such an interpretation would turn the presumption of innocence on its head for all sexual crimes."

Similarly, the expert testimony here, showing that it would be *unusual* for the defendant to be innocent, contravenes the presumption of innocence in the same way: it supports an inference of probable guilt from the fact of accusation. That words instead of numbers are used to support this inference makes no difference–the effect is the same.

3. <u>This sort of testimony, which recurs in case after case, does raise substantial questions concerning the fundamental fairness of child sex abuse trials, and does possibly compromise the integrity of the judicial process.</u>

The State responds that this reference to the low incidence of false

allegations in its expert's testimony, and in the prosecutor's closing, is an "isolated" one, and should not, therefore, be dispositive under plain error review (S.Bf, 32). However, there is a bigger problem, which is that the totality of Ms. Dutton's "blind" testimony about the characteristics of child sexual abuse "disclosures" actually constitutes an attack on the presumption of innocence.

To see this, it will be helpful to examine how this court characterizes this kind of testimony, in one of its many cases approving it.[4] In *State v. Robins,* 1998 MT 71, ¶16-18, 369 Mont 291, 297 P3d 1213, this court states:

> "We have consistently upheld the use of experts to explain the complexities of child sexual abuse...a topic that many or most jurors have no common experience with...This is particularly so when the victim and perpetrator are family members...Child sexual abuse victims often respond to the abuse with seemingly puzzling and contradictory behavior...the expert's testimony educates and enlightens the jury...the jury can then make a more informed decision when it assesses the victim's credibililty...
>
> Dutton's testimony qualifies...as educational testimony on a topic outside of most jurors' experience...Dutton's testimony was intended to help the jury comprehend some of [the child's] behavior that might have otherwise seemed inconsistent with abuse.

[4] The testimony in question in the quoted case was presented by the same expert who . testified at Mr.Sinz' trial, Ms. Wendy Dutton.

For example, Dutton explained that it was not unusual for sexual abuse victims to not report the abuse, especially when the victim has a close relationship to the perpetrator, or for the victim to act inappropriately when discussing the abuse. Dutton also may have helped the jury see Robins' actions as a pattern of abuse... [Her testimony was presented] for the purpose of deciding whether the victim's acts and words after the crime were consistent with those of other sexually abused children..."

As this exposition makes clear, the expert is *educating the jury to convict.* This is done by means of the following syllogism: (1) in cases of "confirmed" abuse (therefore, confirmed guilt), the victims often behave in ways that might otherwise create doubts about the truth of their stories; (2) but their stories are true; (3) this child acts in these ways; (4) this child's story is true; hence (5) defendant is guilty. This is an attack on the presumption of innocence which is slightly more subtle than the reference to the low incidence of false reports, but just as telling. Instead of inferring a defendant's guilt from the very *fact* of his being accused, the jury is being instructed to infer his guilt from the *manner* in which he is being accused.

In Montana, it is often said that the presumption of innocence

> "comes to the aid of the defendant at every stage of the case...and surrounds him at every step in the trial, and to its benefits he is entitled in the determination of every fact by the jury..."
> –*State v. Newman,* 2005 MT 348, ¶24, 330 Mont160, 127 P3d 374.

Unfortunately, in a child sexual abuse case, this supposed entitlement ends prematurely–after the State's expert has testified–and long before the jury determines any fact. This is because, before they deliberate and find any facts, the jurors have been "educated" to find the children's stories of sex abuse true, since they resemble all the other true stories the expert has studied.[5] In other words, the expert testimony predisposes the jurors to a finding of guilt *before* they actually weigh and evaluate any of the actual evidence in the case–precisely the circumstance the presumption of innocence is designed to prevent.

Appellant submits the constant use of this kind of expert testimony in child sexual abuse trials does in fact raise substantial questions concerning the fundamental fairness of these trials, and does compromise the integrity of the judicial process. Defendants–including sex-crime defendants–should not have to suffer a significant risk that their conviction will be obtained because the jury relied on authoritative-seeming, generalized research data which indicates they are probably

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[5]Whether the jurors actually require any "education" in child sex abuse is an interesting question in itself. The members of Mr. Sinz' jury apparently did not: 15 venire-persons were disqualified because of their close acquaintance with child sexual abuse, and the foreman of Mr. Sinz' trial jury was all-too-well acquainted with the subject, including delayed disclosure, close family relationship, grooming, escalating conduct, and all the rest.

guilty because so many others have been.

CONCLUSION

Mr. Sinz' convictions should be reversed, and the case remanded for a new trial.

RESPECTFULLY SUBMITTED this 27th day of November, 2020,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, M.R.App P, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft WordPerfect is 4,957 words, excluding all words not to be counted under Rule 11(4)(d).

/s/ _________________
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APPENDIX

CERTIFICATE OF SERVICE

I, William Boggs, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 11-27-2020:

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